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UNIVERSITY OF TORONTO**

**BANKRUPTCY LAW
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BANKRUPTCY LAW

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BANKRUPTCY LAW
Winter Term 2006

Professor Tony Duggan and Mr Andy Kent

COURSE OUTLINE AND READING GUIDE

1. History and policy

1.1 The foundations of Canadian bankruptcy law

- *Tasse Report*, CB p.5.

1.2 The different kinds of insolvency proceedings

1.2.1 Commercial

American Law Institute, *Transnational Insolvency Project: International Statement of Canadian Bankruptcy Law* (1997), pp 3-15 and 45-48, Supp. Mats.

- Formal bankruptcy
- BIA proposals
- CCAA plans
- Receivership
- Winding-Up and Restructuring Act

1.2.2 Consumer

Commentary, CB, pp 611-616

- Formal bankruptcy
- BIA proposals

1.3 Policy considerations

- Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (1986), CB, p. 22.
- Alan Schwartz, "A Normative Theory of Business Bankruptcy" *Virginia Law Review* (forthcoming), Part I, Supp. Mats.
- Elizabeth Warren, "Bankruptcy Policy" (1987) 54 *University of Chicago Law Review* 775, , p.34.

2. Formal bankruptcy

2.1 *Initiation of proceedings*

2.1.1 Involuntary bankruptcy: petition for receiving order: *BIA, s.43*

- Re Dixie Market (Nurseries) Limited, CB, p.84.
- Re Holmes and Sinclair, CB., p.85.
- Re Mastronardi, CB., p.86
- Platt v. Malstrom, CB., p.93
- Bank of Montreal v. Scott Road Enterprises Ltd, CB., p. 97

2.1.2 Voluntary bankruptcy: assignment for benefit of creditors: *BIA, s.49*

Re Dahl, CB, p.104

Re Wale, CB., p. 107

2.1.3 Consequences of bankruptcy

- Automatic stay: *BIA, s.69.3*

Vachon v. Canada, CB, p.116

R v. Fitzgibbon, CB, p.125

- Effect on uncompleted executions: *BIA, ss 70, 73*
- Property vests in trustee: *BIA, s.71(2)*
- Property not to be removed from province: *BIA, s. 76*
- Effect on banking transactions: *BIA, s.78*
- Duties of bankrupt: *BIA, ss 158-160*
- Bankruptcy offences: *BIA, ss 198-200*

2.1.4 Administration

- Meetings of creditors: *BIA, ss 102-105*
- Procedure at meetings: *BIA, ss 105-115*
- Inspectors: *BIA, ss116-120*
- First-time bankrupts: *BIA, s.168.1(a)*
- Examination of bankrupts: *BIA, ss 161-167*

2.2 *Property of the estate*

2.2.1 What is “property”?

- Chicago Board of Trade v. Johnson, CB., p.137
- *Commentary*, CB, pp 141-143
- Re Holley, CB, p. 143

2.2.2 Bankrupt’s income and other after-acquired property: *BIA*, ss 67(1)(c) , 68, 99

- Monteith (Trustee of) v. Monteith, Supp. Mats.
- Re Landry, CB, p. 582
- Bill C-55, ss 57 and 58

2.2.3 Exempt property: *BIA*, s.67(1)(b), (b.1)

- Re Fields, CB, p. 157
- Bill C-55, ss 57(1), inserting new BIA s.67(1)(b)-(b.3).

2.2.4 Secured creditors: *BIA*, ss 69.3 (2), 70(1), 71(2), 2(1)

- Re Giffen, CB, p. 148
- R. v. Ford Credit Limited, CB, p.325

2.2.5 Trusts: *BIA*, , ss67(1)(a), (2), (3)

- Re Ontario Worldair Limited, CB, p. 162
- Baltman v. Melnitzer, CB, p. 171

2.2.6 Set-off: *BIA*, s.97(3)

- Coopers & Lybrand v. Lumberland Building Materials, CB, p. 181

2.3 Review of pre-bankruptcy transactions

2.3.1 Fraudulent conveyances: *Fraudulent Conveyances Act*, Supp. Mats

- Profile United Industries Ltd v. Coopers and Lybrand, CB, p.196
- Optical Recording Laboratories v. Digital Recording Corp., CB, p.200

2.3.2 Settlements: *BIA*, ss 91-93

- Re Dowswell, CB, p.207
- Royal Bank of Canada v. Whalley, CB, p.212
- Royal Bank of Canada v. North American Life Assurance Co., CB, p.218

2.3.3 Reviewable transactions: *BIA*, s.100

- Standard Trustco Ltd (Trustee of) v. Standard Trust Co., CB, p.226

2.3.4 Preferences: *BIA*, ss 95-96 and *Assignments and Preferences Act*, Supp. Mats

- Canada Fruit Wholesalers Inc. (Trustee of) v. Hapco Farms, CB, p.237
- Blaine L. Hudson, Trustee v. Benallack, CB, p. 242

2.3.5 Reforms: *Bill C-55*, ss 3, 4(3), 71-76

2.4 Executory contracts

2.4.1 Contracts in general

(a) Trustee's right to affirm: *BIA*, ss 30-32

- Potato Distributors Inc. v. Eastern Trust Co., CB, p.260

(b) Trustee's right to reject

- In Re Thomson Knitting Co., CB, p.264
- Creditel of Canada Ltd v. Terrace Corp., CB, p.267
- New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd, Supp. Mats
- Armadale Properties Ltd v. 700 King St (1997) Ltd, CB, p.292

(c) Trustee's right to assign: *BIA*, s.30(1)(a)

2.4.2 Landlord and tenant agreements: *BIA, s.146 and Commercial Tenancies Act*

(a) Trustee's right to affirm: *Commercial Tenancies Act, s.38(2)*

- Re Limestone Electrical and Supply Co. Ltd, CB, p.270
- Re Darrigo Consolidated Holdings, CB, p.274
- Re Vrablik, CB, p.278

(b) Trustee's right to reject: *Commercial Tenancies Act, s.39*

(c) Trustee's right to assign: *Commercial Tenancies Act, s. 38(2)*

- Re Limestone Electrical and Supply Co. Ltd, above
- Re Darrigo Consolidated Holdings, above

2.4.3 Bill C-55 reforms

(a) Trustee's right to affirm: *new BIA s.84.2*

(b) Trustee's right to reject: *no provision (cf new BIA, s.65.11 re proposals)*

(c) Trustee's right to assign: *new BIA s.84.1*

2.5 *Claims against the estate*

2.5.1 Provable claims: BIA, ss 121, 135

2.5.2 Consequences of non-provable claim: BIA, ss 169, 178(2), 2(1), "creditor"

2.5.3 Contingent or unliquidated claims

- Re F.E.A. Griffiths Corporation , CB, p.125
- Re Carling Acceptance Ltd, CB, p.297
- Re Wiebe, CB, p.308
- Claude Resources Inc. (Trustee of) v. Dutton, CB, p.301
- Bittner v. Borne Chemical Company, Inc., CB, p.310

2.6 *Ranking of creditors and distribution of proceeds*

2.6.1 Introduction

2.6.2 Crown claims: *BIA*, ss 136, 67(2) and (3), 86, 87

- *Commentary*, CB, pp 350-352, 357-361, 374-376
- Barbara K. Morgan, “Should the Sovereign be Paid First -- A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy”, CB, p.367

2.6.3 Protection of wage earners: *BIA*, s.136

- Kevin Davis and Jacob Ziegel, “Assessing the Economic Impact of a New Priority Scheme for Unpaid Wage Earners and Suppliers of Goods and Services”, CB, p.381
- Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals Joint Task Force Working Group on Priorities and Other Issues, *Report* (2004), Part 3, Supp. Mats.
- Bill C-55, ss.1 (Wage Earner Protection Program Act), 67 (new *BIA*, ss 81.3-81.5 enacting a super-priority rule for unpaid wages, etc and unpaid pension fund deductions), s.88 (amending *BIA*, s.136(1)(d)).

2.6.4 Unpaid suppliers: *BIA*, ss 81.1 and 81.2

- Jacob S. Ziegel, “New and Old Challenges in Approaching Phase Three Amendments to Canada’s Commercial Insolvency Laws”, CB, p.394
- *Port Alice Specialty Cellulose Inc. (Trustee of) v. ConocoPhillips Co* (BCCA, 2005), Supp. Mats.

2.6.5 Subordination of claims

- *Re Maxwell Communications Corp. plc*, Supp Mats
- *Re Air Canada Ltd*, Supp. Mats.
- *Re Blue Range Resource Corp.*, Supp. Mats
- Bill C-55, s.90 (adding new *BIA*, s.140.1)

2.7 Discharge from bankruptcy: BIA, ss 168.1-182

- Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (1986), Chapter 10, Supp. Mats.
- Re McAfee, CB, p.593
- Re Nieuwenhout, Supp. Mats.
- Re Kelly, CB, p.599
- Personal Insolvency Task Force, *Final Report*, 14-16 (*Discharge of Student Loans*), CB, p.604.
- Bill C-55 reforms (*re* student loans, see s.107 amending BIA, s.178(1.))

3. CCAA commercial reorganizations

3.1 Introduction

- American Law Institute, *Transnational Insolvency project: International Statement of Canadian Bankruptcy Law* (1997), pp 69-88 (Supp. Mats)

3.2 Scope and application: CCAA, Part 1

- Elan Corp. v. Comiskey, CB, p.482
- Joint Report of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals, 2-4, CB, p.483

3.3 Commencing a CCAA reorganization

3.3.1 The initial filing

- CCAA, ss 9-11, Bill C-55, s.127 (*amending CCAA, s.10*)
- Re Quintette Coal Limited, *ex parte* Order, CB, p.486
- Re Stelco Inc., Supp. Mats.
- Bill C-55, s.128, inserting new s.11.5 (removal of directors)

3.3.2 The stay

- CCAA, ss 11-11.5
- Quintette Coal Limited v. Nippon Steel, CB, p.490

3.4 Operating during a CCAA reorganization

3.4.1 The monitor: CCAA, ss 11.7-11.8

- Canadian Imperial Bank of Commerce v. Quintette Coal Ltd, CB, p. 510
- Bill C-55, s.129, inserting new s.11.7 (court to appoint monitor), s.131, inserting new ss 23-25 (monitors) and s.128, inserting new s.11.52 (security for costs of monitor, etc).

3.4.2 Debtor company's obligations

- Bill C-55, s.131, inserting new CCAA, s.35 (debtor company's duties)
- Bill C-55, s.131, inserting new CCAA, s.36 (restriction on disposal of assets)
- Bill C-55, s.128, inserting new CCAA, s.11.5 (removal of directors)
- Bill C-55, s.128, inserting new CCAA, s.11.51 (security or charge relating to director's indemnification).

3.4.3 Review of pre-filing transactions

3.4.4 Executory contracts

(a) Contracts in general

- *Commentary*, CB, pp256-257
- Re Doman Industries Ltd, Supp. Mats.

(b) Landlord and tenant agreements

- *Commentary*, CB, pp 255-256
- Re Dylex Ltd, CB, p.495
- Alternative Fuel Systems Inc. v. Remington Development Corp., Supp. Mats.

(c) Collective bargaining agreements

- Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mine Inc., CB, p.498
- Duggan, "Canadian Bankruptcy Law Reform: A Selective Research Agenda" (2005) 13 *Insolvency Law Journal* 67 at 72-73, Supp. Mats.

(d) Bill C-55 reforms

- Debtor's right to affirm: *new CCAA, ss 34 (limits on counterparty's right to terminate), 11.4 (critical suppliers)*
- Debtor's right to reject: *new CCAA, ss.32(general), 33 (collective agreements)*
- Debtor's right to assign: *new CCAA, s.11.3.*

3.4.5 Debtor-in-possession financing

- Michael Rotsztain, “Debtor-in –Possession Financing in Canada: Current Law and a Preferred Approach” (2000) 33 CBLJ 283, 2837, CB, p.506
- Bill C-55, s.128, inserting new s.11.2 (interim financing)

3.5 *Claims*

3.5.1 General: *CCAA*, s.12

3.5.2 Priority of Crown claims: *CCAA*, ss 18.2-18.5

3.5.3 Subordination of claims

- Re Air Canada Ltd, Supp. Mats.
- Re Blue Range Resource Corp., Supp. Mats.

3.5.4 Set-off: *CCAA*, s.18.1

3.5.5 Bill C-55 reforms

- General: new *CCAA*, ss 19-21
- Crown claims: new *CCAA*, s.6(2), ss 37-40
- Wage claims: new *CCAA*, s.6(4)
- Pension contributions: new *CCAA*, s.6(5)
- Subordination of equity claims: new *CCAA*, s.22(3)
- Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals Joint Task Force Working Group on Priorities and Other Issues, *Report* (2004), Part 6, Supp. Mats.

3.6 *Approval of CCAA plans*

3.6.1 Classification of creditors and voting

- Norcen Energy Resources Limited v. Oakwood Petroleums, CB, p.515
- Bill C-55, s.131, inserting new s.22 (company may establish classes)

3.6.2 Status of shareholders

- Re Loewen Group Limited, CB, p.521

3.6.3 Court approval

- Re Anvil Range Mining Corp., CB, p.525

4. BIA commercial reorganizations

4.1 Introduction

- American Law Institute, *Transnational Insolvency project: International Statement of Canadian Bankruptcy Law* (1997), pp 48-67 (Supp Mats)

4.2 Relationship with CCAA: CCAA, s.11.6, BIA, s.66(2)

- *Commentaries*, CB, pp 477 and 531

4.3 Initiation of proceedings: BIA, ss 50 (proposal), 50.4 (notice of intention)

4.4 The stay: BIA, ss 69-69.5

- *John Deere Credit Inc. v. Doyle Salewski Lemieux Inc*, CB, p. 333
- *Re Cumberland Trading Inc.*, CB, p.532
- *Re High Street Construction Ltd*, CB, p.536

4.4 Governance

4.4.1 The trustee: BIA, ss 50, 50.4, 50.5

4.4.2 Inspectors: BIA, s.56

4.4.3 Debtor's obligations

- Bill C-55, s.44 inserting new BIA, 65.13 (restriction on disposal of assets)
- Bill C-55, s.42 inserting new BIA, s.64 (removal of directors)
- Bill C-55, s.42 inserting new BIA, s.64.1 (security or charge relating to director's indemnification)

4.4.4 Review of pre-filing transactions: BIA, s.66

4.4.5 Executory contracts

(a) Contracts in general: BIA, s.65.1

- *Commentary*, CB, pp 256-257

(b) Landlord and tenant agreements: *BIA*, s.65.2

- *Commentary*, CB, pp 255-256
- *Re Carr-Harris & Co.*, CB., p.539

(c) Bill C-55 reforms

- Debtor's right to reject: *new BIA*, ss65.11(*general*), 65.12 (*collective agreements*).
- Debtor's right to assign: *new BIA*, ss 66(1.), 84.1

4.4.6 Debtor-in-possession financing: *Bill C-55*, s. 36, inserting *new BIA*, s.50.6 (*interim financing*)

4.5 *Claims*

4.5.1 General: *BIA*, s.66(1)

4.5.2 Priority of claims: *BIA*, s.60

4.5.3 Pension plan contributions: *Bill C-55*, inserting *new BIA*, s.60 (1.5)

4.5.4 Subordination of equity claims: *Bill C-55*, inserting *new s.54(2)(a)(i)*

4.5.5 Limitations on voting: *Bill C-55*, inserting *new s.54(5) and (6)*

4.6 *Classification of creditors and voting*: *BIA*, ss 50, 51-54

4.7 *Secured creditors*: *BIA*, ss 50.1, 50(1.4), 54(2), 62(2) and also ss 69.1(2) and 244

- *Commentary*, CB, p.531
- *Notes On Commercial Reorganizations*, Supp. Mats.

4.8 *Court approval*: *BIA*, ss58-61

- *Re Mernick*, CB, p.543
- *Re No.289 Taurus Ventures Ltd*, CB, p.547

4.9 *Policing compliance*: *BIA*, ss 62.1, 63

5. International insolvencies

5.1 *Introduction*

5.1.1 Factors giving rise to international dimension

- Debtor personally connected with more than one country
- Debtor in State A has assets in State B
- Debtor in State A incurs liability to creditor in State B
- Debtor in State A incurs liability that is governed by law of State B

5.1.2 Issues

- Does the presence of international factors prevent a Canadian court from asserting bankruptcy jurisdiction ?
- Are non-Canadian creditors entitled to participate in a Canadian bankruptcy?
- Can a Canadian trustee use the BIA stay provisions to prevent a creditor from taking action against the debtor outside Canada?
- If the debtor has assets outside Canada, can the trustee recover them?
- Do the BIA anti-avoidance provisions (settlement, preferences, etc) apply to transactions entered into outside Canada?
- Is a discharge from bankruptcy given by a Canadian court enforceable outside Canada?
- Does a BIA or CCAA reorganization prevent a dissenting creditor from suing for its debt outside Canada?
- When may a trustee in foreign proceedings seek the assistance of a Canadian court?
- What rules apply when concurrent bankruptcy proceedings are initiated against the debtor in two or more countries?

5.1.3 Universality and territoriality

- Commentary, CB, p.642
- Holt Cargo Systems v. ABC Containerline NV (Trustees of), CB, p.659

5.2 Does the presence of international factors prevent a Canadian court from exercising bankruptcy jurisdiction?

5.2.1 The extra-territorial reach of the BIA and CCAA

5.2.2 Foreign recognition

5.2.3 Rules governing foreign recognition

- Re Singer Sewing Machine Co. of Canada Ltd, CB, p.648
- Re Babcock & Wilcox Canada Ltd, CB, p.652

5.3 Are non-Canadian creditors entitled to participate in a Canadian bankruptcy?

5.4 Can a Canadian trustee use the BIA stay provisions to prevent a creditor from taking action against the debtor outside Canada?

5.5 If the debtor has assets located outside Canada, can the trustee recover them?

- CB, Commentary, p.643
- Holt Cargo, CB, p.659

5.6 Do the BIA avoidance provisions (settlements, preferences, etc) apply to transactions that are entered into outside Canada?

- In re Maxwell Communication Corporation plc, CB, p.633

5.7 Is a discharge from bankruptcy given by a Canadian court enforceable outside Canada?

- Re Bialek, CB, p.674

5.8 Does a BIA or CCAA reorganization prevent a dissenting creditor from suing to enforce its debt outside Canada?

5.9 Providing assistance

5.9.1 Reasons why assistance might be required

5.9.2 The Canadian provisions

- BIA, Part XIII,
- CCAA, s.18.6
- Bill C-55, s. 122 enacting a new BIA, Part XIII (Cross-Border Insolvencies) and s.131, enacting a new CCAA, Part IV (Cross-Border Insolvencies)

5.9.3 Provisions elsewhere

- United States: Bankruptcy Code, s.304 (discussed CB, pp 646-7)
- United Kingdom: Insolvency Act 1986, s.426

5.10 Concurrent proceedings

5.10.1 Factors giving rise to concurrent proceedings

5.10.2 Current law

- BIA, Part XIII
- CCAA, s.18.6

5.10.3 The Bill C-55 reforms (the UNCITRAL Model Law)